



Environmental Fact Sheet

EPA Proposes a Lender Liability Rule for Underground Storage Tanks

Background

Many underground storage tank (UST) owners and operators, particularly small businesses, are in need of capital to make improvements to their facilities to comply with a broad spectrum of environmental regulations. EPA is particularly concerned about the ability of UST owners and operators to comply with federal UST upgrading and replacement requirements. The uncertainty of the liability of secured creditors (financial institutions and others who extend secured loans) regarding UST properties that they hold as collateral has had a chilling effect on lenders' willingness to make loans to UST owners. Once promulgated, this rule should result in the removal of a current barrier to the financing of UST facilities and result in greater capital availability for UST owners and operators.

Subtitle I of the Resource Conservation and Recovery Act (RCRA) contains a "security interest exemption" that provides secured creditors ("lenders") a limited statutory exemption from corrective action (cleanup) liability for releases from petroleum USTs. However, many lenders are unaware of the existence of this exemption and many others are uncertain about its scope of coverage. Further confusion has resulted from various court cases regarding Superfund lender liability. The D.C. Circuit Court of Appeals recently vacated EPA's Superfund lender liability rule, which attempted to clarify the security interest exemption in the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The court decision and EPA Superfund rule were limited to actions taken under CERCLA and do not affect today's proposed UST rule.

Action Taken

The UST-specific lender liability proposed rule proposes regulatory criteria specifying conditions under which certain secured lenders may be exempted from RCRA Subtitle I regulatory requirements. Under the proposal, a lender is eligible for an exemption, both prior to and after foreclosure, from compliance with all Subtitle I requirements as an UST "owner," and from the Subtitle I corrective action and financial responsibility requirements as an UST "operator" if the lender: 1) holds an ownership interest in an UST, or in a property on which the UST is located, in order to protect its security interest (a lender typically holds property as collateral as part of the loan transaction), 2) does not engage in petroleum production, refining and marketing, 3) does not participate in the management or operation of the UST, and 4) does not store petroleum in the UST after foreclosure.

Discussion

The proposed rule contains the following major elements:

Lenders' Regulatory Obligations as UST Owners: EPA believes that a lender holds only limited ownership rights when it takes possession of an UST property primarily to protect a security interest. These limited ownership rights do not rise to the level of full ownership sufficient to make the lender an "owner" of the UST(s) under RCRA Subtitle I. Therefore, the Agency is, under its broad rulemaking authority in Subtitle I, proposing to exempt from the UST regulatory requirements those lenders who meet the criteria specified in today's proposal (i.e., hold indicia of ownership primarily to protect a security interest without participating in management or engaging in petroleum production, refining, and marketing).

Lenders' Regulatory Obligations as UST Operators: Prior to foreclosure, a lender typically will not be involved in the day-to-day operations of an UST and will therefore not incur liability as an "operator." By foreclosing, however, a lender takes affirmative action with respect to the UST(s), and therefore, by necessity, takes control of and responsibility for the UST, thus subjecting it to all Subtitle I requirements as an operator. However, under today's proposal, a lender is exempted from UST corrective action regulatory requirements under the following circumstances: 1) where the foreclosed-on UST(s) is no longer storing petroleum, or where the lender empties the UST(s) within 15 days after foreclosure, and 2) where the lender either temporarily or permanently closes the UST(s).

A lender who chooses to continue operation of its USTs would not be eligible for the proposed regulatory exemption and would face potential UST regulatory responsibility for corrective action in the event of a release. The lender would also be responsible for compliance with the UST technical standards and financial responsibility requirements under Subtitle I.

Lenders' Regulatory Obligations for UST Financial Responsibility: EPA proposes to exempt lenders from demonstrating financial responsibility for UST corrective action if they meet the criteria specified in today's proposal and are thus exempted from UST corrective action regulatory compliance. EPA also proposes to exempt lenders from demonstrating financial responsibility for third party liability. Lenders must empty their tanks following foreclosure, thereby preventing the likelihood of future contamination. The only coverage lenders would need in this situation would be for the costs of contamination that might have occurred prior to the tanks' being emptied. Lenders may find such coverage for pre-existing conditions extremely difficult to obtain. EPA therefore believes that it is impractical and unnecessary to require lenders to demonstrate their ability to cover the costs of third-party liability.

Contact

The Environmental Protection Agency encourages the public to comment on this proposed rule, which was published in the Federal Register on June 13, 1994. The Agency will accept comments for 60 days (until August 12, 1994). For additional information or for a copy of the Federal Register notice, contact EPA's RCRA/Superfund Hotline, Monday through Friday, 8:30 a.m. to 7:30 p.m. EST. The national toll-free number is 1 800 424-9346; for the hearing impaired, the number is TDD 800 553-7672.